NO. 83-357

IN THE
SUPREME COURT OF THE UNITED STATES

1983 Term

JAMES LAWRENCE CUNNINGHAM,
Appellant,

v.

JUDY BAKER INMAN GOLDEN
and
STEVEN LEE INMAN,
Appellees.

APPEAL FROM THE
SUPREME COURT OF TENNESSEE

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS

LEWIS A. COMBS, JR.
Attorney for Appellant
717 Market Street
Knoxville, Tennessee 37902
615-637-2832

HARRY WIERSEMA, JR.
Attorney for Appellant
912 South Gay Street
Suite 1200
Knoxville, Tennessee 37902
615-524-7496

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Comes the Appellant, James Lawrence Cunningham, and in response to Appellees' Motion to Dismiss offers the following brief to be considered by the Court in determining the viability of Appellees' Motion.

First, Appellant has serious reservations about Appellees having obtained time extensions sufficient to timely file

its Motion to Dismiss, since Appellant nor Appellant's counsel have ever received any correspondence to indicate Appellees were seeking any time extensions. In fact, since filing his jurisdictional statement on August 29, 1983, Appellant had not received any material from Appellees until receiving their Motion to Dismiss on March 27, 1984. Under Rule 16 of the Rules of the Supreme Court, the Appellees must within 30 days after receipt of the jurisdictional statement file their Motion to Dismiss, unless the time is enlarged by the Court or a Justice thereof, or by the Clerk of the Court under the provisions of Rule 29.4. Appellant argues that this nearly six month delay past the filing deadline in unjustified, especially considering the nature of the case at bar. Furthermore, having never received

any correspondence between Appellees and the Clerk of the Court applying for an extension of time, Appellant was denied the right under Rule 29.4 to request that said application be submitted to a Justice or to the Court. Also, during numerous contacts with the Clerk of the Court inquiring as to the status of the Appeal, no mention was made that Appellees had filed an application for extension of time, and Appellant was informed only of one informal extension which expired on January 23, 1984. Therefore, Appellant urges Appellees' Motion to Dismiss be denied as untimely.

In their Motion to Dismiss, Appellees contend that Appellant assumes the existence of facts never established in a judicial proceeding (Motion to Dismiss, p. 6), but do not enumerate any such facts. Appellant argues that all facts contained in its Jurisdictional Statement were established

in the record and would welcome Appellees to point out the facts of which they speak. Next, the Appellees argue that the Appellant lacks standing to argue constitutional issues on behalf of the Appellant's minor child, Daniel Todd Inman. (Motion to Dismiss, p. 6). Appellees, having never raised this issue at the trial level, should be precluded from doing so at this stage in the proceedings. Appellees also contend that Appellant is a "stranger" to the family unit (Motion to Dismiss, p. 17), when, in fact, Appellant was essentially a de facto husband, having cohabited with Appellee Golden before conception, after conception, and for some 2½ years after the birth of Daniel Todd Inman. During this time, Appellant performed all the usual parental duties of a father and husband, and filed his Petition for Legitimation less than four months after Appellee Golden left the

Appellant's household taking their minor son with her.

Appellees argue that Appellant would disrupt the family unit and bastardize the child, and that the child would gain nothing thereby. (Motion to Dismiss, p. 17). Appellant contends this arguement is without merit in the case at bar, since the Appellant would not be disrupting the family unit, since the Appellees were divorced shortly after the birth of the minor child in question. Also, the child would not be "bastardized", as next asserted by Appellees (Motion to Dismiss, p. 17), as Appellant seeks to legitimate his son as a step to reestablish their substantial relationship.

Appellees assert that Frazier v. McFerren, 55 Tenn App 431, 402 SW2d 467 (1964), was founded on the principle that the legal father was unwilling or unable to support the child. Appellant

argues that these facts were not present in Frazier and that the Appellees are merely attempting to contrast the case at bar with Frazier by relying on non-existent facts. Appellees further contend a member of the family unit is in the best position to judge whether disruption of the family unit would be in the child's best interests. (Motion to Dismiss, pp. 17-18). This viewpoint is clearly in contrast to Justice O'Connor's concurring opinion in Mills v. Habluetzel, 456 US 91 (1982), where she stated "the mother's and child's interests are not congruent". (456 US 91, 105, n.4).

Appellees throughout their Motion to Dismiss constantly make the distinction between an outsider and insider to the family unit. In the case at bar, the Appellant is not an outsider to the family unit, and in fact, in a medical information form, Appellee Golden admitted the

Appellant was the father of Daniel Todd Inman, and the interviewing pediatric nurse described the family relation as "parents very loving of child and vice versa". Having established a substantial relationship with the child, the Appellant is clearly an "insider" and by the Appellees own rationale gives him substantial rights as to the minor child, Daniel Todd Inman.

Appellees make a broad generalization that "in the eyes of the law, the Appellant is a stranger to the child" (Motion to Dismiss, p. 30), but nowhere do the Appellees point to any law they are relying on in making this statement, and in any event the case at bar is a far cry from any case law that Appellees rely on. Appellees argue that the case of A v. X, Y, and Z, 641 P2d 1222 (Wyo.), cert. denied, 103 SCt 388(1982), presents questions identical to the issue in this appeal, (Motion

to Dismiss, pp. 18-19), and rely heavily upon the fact that in a 6-3 decision this Court denied certiorari in that case. (Justices Brennan, White, and Blackmun would have granted certiorari). Appellant contends that the case at bar is appreciably different from A v. X, Y, and Z, since A never formed any relationship with the child so as to merit the constitutional protection afforded in Stanley v. Illinois, 405 US 645 (1972). A simply had a sexual relationship with Y some three months before she married Z. Then, some six months later the child (X) was born. Also, there is no indication that A supported Y after conception or X after birth. Therefore, A was merely in the position of Leon Quillion in Quillion v. Walcott, 434 US 253 (1978). Mr. Quillion also had never established a home with the minor child or the mother, and likewise never claimed any relationship with the minor child, as the mother

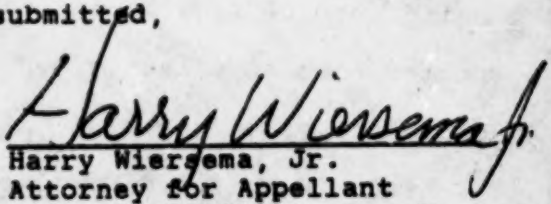
had exclusive custody and control of the child for its entire life. Unlike A or Leon Quillion, Appellant had formed a substantial relationship with the minor child, Daniel Todd Inman, and had supported both Appellee Golden and their child for some 2½ years.

This Court heard Quillion because those less compelling facts still required that this Court find a substantial question and grant jurisdiction, even though Quillion did not raise an equal protection question. Certainly, the facts of the ca e at bar are compelling enough for this Court to find a substantial question, as Stanley requires deference to "the interest of a man in the children he has sired and raised, absent a powerful counterveiling interest". (405 US at 651).

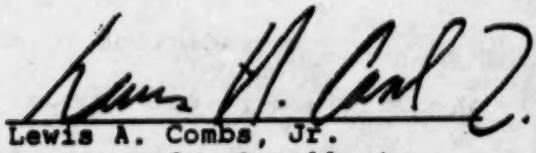
For the reasons stated above, Appellant respectively requests that Appellees' Motion to Dismiss be denied, and the Court

find that this case presents substantial equal protection and due process questions, worthy of the Court's jurisdiction.

Respectfully submitted,



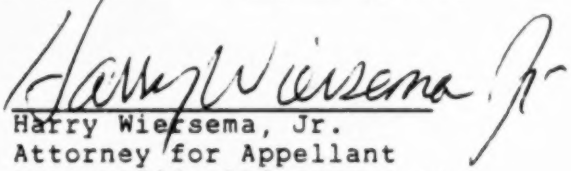
Harry Wiersema, Jr.
Attorney for Appellant
Suite 1200, 912 S. Gay St.
Knoxville, Tennessee 37902
615-524-7496



Lewis A. Combs, Jr.
Attorney for Appellant
717 Market St.
Knoxville. Tennessee 37901
615-637-2832

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Brief in Opposition To Appellees Motion To Dismiss has been mailed with the postage prepaid to the Attorney General of the State of Tennessee, William M. Leech, Jr., 450 James Robertson Parkway, Nashville, Tennessee 37219; Wilson S. Ritchie, Suite 2301, Plaza Tower, Knoxville, Tennessee 37929-2301, attorney for Appellee Judy Baker Inman Golden; and Frank L. Flynn, Suite 600, Walnut Building, Knoxville, Tennessee 37901, attorney for Steven Lee Inman, this day of April, 1984.



Harry Wiersema, Jr.
Attorney for Appellant
Suite 1200, 912 S. Gay St.
Knoxville, Tennessee 37902
615-524-7496